Airiy Azmi bin Mohamed v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–141 OF 2011
LOW HOP BING, AZIAH ALI AND MOHTARUDIN BAKI JJCA
10 MAY 2012

B

Criminal Law — Dangerous drugs — Trafficking — Trafficking in 59,911.7g of cannabis — Conviction and sentence — Appeal against — Drugs recovered from secret compartments in car — Accused denied any knowledge — Whether attract application of s 37(h) of the Dangerous Drugs Act 1952 ('DDA') — Whether conduct of accused in concealing or transporting drugs came within definition of trafficking in s 2 of the DDA — Dangerous Drugs Act 1952 ss 2, 37(h) & 39B

C

D

The appellant ('the accused') had been charged with the offence of trafficking in 59,911.7g of cannabis at Bukit Kayu Hitam Immigration Complex under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) thereof. A total of 65 compressed slabs were recovered from the three compartments in the car driven by the accused who was alone in the car. Upon analysis, the chemist confirmed that the substance in the slabs was cannabis with a net weight of 59,911.7g. At the close of the prosecution's case, the judicial commissioner ('JC') found that the prosecution had established a prima facie case against the accused. The accused in his defence denied having any knowledge of the drugs recovered from the secret compartments in his car and claimed that he was an innocent carrier. The learned JC rejected the accused's defence and found him guilty as charged and sentenced him to death. The appeal herein revolved on the JC's evaluation, assessment and scrutiny of the entire evidence adduced for both the prosecution and the defence.

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Held, dismissing the appeal, affirming the conviction and sentence:
The facts of this case would attract the application of s 37(h) of the DDA which provides that, if any dangerous drug, such as cannabis in the instant appeal, is found concealed in any compartment specially constructed for the purpose on any vehicle, it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in control of the vehicle for the time being, such as the accused herein. Further, there was ample evidence that the accused was concealing or transporting the cannabis from Hatyai, Thailand to Malaysia. His conduct clearly came within the definition of trafficking in s 2 of the DDA (see paras 16–17).

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I

[Bahasa Malaysia summary

Perayu ('tertuduh') telah dituduh dengan kesalahan mengedar dadah kanabis sebanyak 59,911.7g di Kompleks Imegresen Bukit Kayu Hitam di bawah

A s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) Akta tersebut. Sejumlah 65 papak mampat dijumpai daripada tiga bahagian di dalam kereta yang dipandu oleh tertuduh yang berada seorang sahaja di dalam kereta tersebut. Atas analisis, ahli kimia mengesahkan bahawa bahan di dalam papak tersebut adalah kanabis dengan berat bersih sebanyak B 59,911.7g. Pada akhir kes pendakwaan, pesuruhjaya kehakiman ('PK') mendapati bahawa pendakwaan membuktikan kes prima facie terhadap tertuduh. Tertuduh dalam pembelaannya menafikan mempunyai apa-apa pengetahuan mengenai dadah tersebut yang diperolehi daripada bahagian rahsia dalam keretanya dan mendakwa yang dia adalah pembawa yang tidak C bersalah. PK yang bijaksana menolak pembelaan tertuduh dan mendapati dia bersalah seperti yang dituduh dan menjatuhkan hukuman mati ke atasnya. Rayuan di dini berkisar atas penilaian PK, penaksiran dan penelitian keseluruhan keterangan yang dikemukakan untuk kedua-dua pendakwaan dan pembelaan.

D

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman:
Fakta kes ini akan menarik penggunaan s 37(h) ADB yang memperuntukkan, bahawa jika dadah berbahaya, seperti kanabis dalam rayuan ini, didapati disembunyikan di dalam mana-mana bahagian terutamanya yang dibina E untuk tujuan tersebut atas mana-mana kenderaan, ia akan sehingga dibuktikan bertentangan, dianggap disembunyikan dengan pengetahuan pemilik kenderaan dan orang yang mengawal kenderaan tersebut pada masa tersebut, seperti tertuduh di sini. Selanjutnya, terdapat keterangan yang kukuh bahawa tertuduh menyembunyikan atau membawa kanabis dari Hatyai, Thailand ke F Malaysia. Tingkah lakunya jelas memenuhi definisi mengedar dadah dalam s 2 ADB (lihat perenggan 16–17).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras G 205–300.

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(h), 39B(1)(a), (2)

H **Appeal from:** Criminal Trial No 45A–35 of 2009 (High Court, Alor Setar)

Yap Yau Sin (Tay, Bernard & Cheong) for the appellant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the repondent.

I

Low Hop Bing JCA (delivering judgment of the court):

[1] The appellant ('the accused') had been charged with the offence of

trafficking in 59,911.7g of cannabis on 17 April 2009, at about 12.30pm at Lane 2, Examination and Passenger Facility Unit, Bukit Kayu Hitam Immigration Complex, in the district of Kubang Pasu, State of Kedah Darul Aman under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) thereof.

(A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952)

[2] The learned judicial commissioner ('the JC') found him guilty as charged and sentenced him to death.

[3] Our grounds for dismissing the accused's appeal and affirming the conviction and sentence are set out below.

[4] Prior to 17 April 2009, Senior Customs Officers Hasley bin Ahmad ('Hasley') and Mohd Shariff bin Alias ('Shariff') were informed by their superior Amaluddin bin Gimin that a Nissan AD Resort car (to be driven by a suspect across the border from Thailand to Malaysia via Bukit Kayu Hitam on 17 April 2009) would be involved in drug trafficking activities.

[5] Based on the information, a team comprising seven customs officers viz Kaharul Izham, Fazli, Mulyadi, Stanley, Izyan Syazwani, Hasley and Shariff arrived at Bukit Kayu Hitam Immigration Complex in the morning of 17 April 2009. At about 12.30 in the afternoon, a Nissan AD Resort car bearing registration No WGG 1252 ('the car') arrived from Thailand to Malaysia via Bukit Kayu Hitam Immigration Complex. The car entered Lane 2. The accused who was the driver and alone in the car was asked to alight from the car.

[6] At about 12.45pm, Hasley informed Shariff that he (Hasley) had inspected the floor area of the driver's side and found something concealed therein. Shariff then directed Kaharul Izham, Stanley and Fazly to take the car to the Customs Preventive Division Store, some 500 meters away, for a thorough examination. The accused was handcuffed and accompanied by Kamarul Izham, Stanley and Fazley. Between 2.50pm and 3.20pm, upon Shariff's direction, Hasley and Stanley inspected the driver's side and front passenger's side. A secret compartment was found in each of them. Shariff directed Hasley to open both the secret compartments. Hasley recovered from each compartment 26 compressed slabs believed to be cannabis, wrapped in alloy foils and transparent plastic and tied with white and red strings. A total of 52 slabs were recovered from these two compartments.

[7] At 3.50pm, Hasley inspected the boot of the car and found yet another secret compartment from which 13 compressed slabs believed to be cannabis

were recovered. These 13 slabs were also wrapped in alloy foils and transparent plastic and tied with white and red strings.

[8] A total of 65 compressed slabs were recovered from the three compartments in the car. Other items recovered from the car include, inter alia, the accused's ring, watch, belt, white and red stripe Levis collar shirt, a pair of brown shoes, brown pants, wallet with two RM50 notes, three RM1 notes, identity card, Touch-N-Go card, Maybank ATM and CIMB ATM cards.

[9] The 65 compressed slabs and the accused's personal effects were surrendered to the Investigating Officer Customs Superintendent Mohd Shahrin bin Wahab who subsequently handed the 65 compressed slabs over to the chemist ('SP2'). Upon analysis, the chemist confirmed that they were cannabis with a nett weight of 59,911.7g.

[10] At the close of the prosecution's case, the JC found that the prosecution had established a prima facie case against the accused. Defence was called.

[11] The accused elected to give evidence on oath. He denied having any knowledge of the drugs recovered from the secret compartments in his car and claimed that he was an innocent carrier. According to him, he had been engaged by a Thai national, Mut, through Suhaimi (the accused's peer who stayed together with him in Rawang) to import batik from Thailand to Malaysia. He was given a reward of RM2,000 for the trip. Mut had convinced the accused that in the event he (the accused) were to be caught, the batik would be confiscated and Mut would assist him in paying the fine.

[12] On 17 April 2009, when the accused was arrested with the drugs, he did not show any negative reaction such as fear.

[13] On that day, the accused was staying at Hatyai Palace Hotel. Mut came to the hotel and asked him for the key to the car. Two hours later, Mut returned the key and paid the accused the RM2,000. The accused then checked out of the hotel and drove the car from Hatyai to the Malaysia — Thai border in Bukit Kayu Hitam. At about 12.30pm, the car was stopped by Malaysian Senior Custom Officers Zulhelmi, Hasley and Shariff for inspection.

[14] The JC rejected the accused's defence.

[15] The appeal before us turns on the JC's evaluation, assessment and scrutiny of the entire evidence adduced for both the prosecution and the defence. The appeal is substantially fact-based.

[16] In our view, the facts would attract the application of s 37(h) which provides that, if any dangerous drug, such as cannabis in the instant appeal, is found concealed in any compartment specially constructed for the purpose on any vehicle, it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in control of the vehicle for the time being, such as the accused herein.

[17] Next, there is ample evidence that the accused was concealing or transporting the cannabis from Hatyai, Thailand to Malaysia. His conduct clearly comes within the definition of trafficking in s 2.

[18] On the foregoing grounds, we find no merit in this appeal which is hereby dismissed. We affirm the entire decision of the High Court.

Appeal dismissed, conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed